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No. 1329

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IN THE

Supreme Court of the United States

October Term, 1968

STATE OF NEW HAMPSHIRE,
Petitioner,

v.

ATOMIC ENERGY COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF VERMONT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The State of Vermont, as *amicus curiae* pursuant to Rule 42 of the Rules of this Court, respectfully submits that the petition of the State of New Hampshire for a writ of certiorari in Case No. 1329 should be denied. The *amicus curiae* takes the position that none of Petitioner's three "Reasons For Granting Writ" (Pet. 6-7) show a need for review of the decision below by this Honorable

Court. However, the *amicus curiae* will limit its opposing argument herein to Petitioner's "Reason" which most directly concerns the State of Vermont and its regulatory agencies, namely that

> "(t)he lower Court's decision effectively destroys the State's powers to regulate the discharge of effluent from facilities into State waters, pursuant to N.H.R.S.A. Chap. 149 and similar State Statutes." (Pet. 6-7).

INTEREST OF THE AMICUS CURIAE

The interest of the State of Vermont in the federal agency jurisdictional question presented herein is twofold:

1. The State is primarily concerned with maintaining intact the jurisdiction of its own water pollution control agency over the activities of facilities located within the borders of the State of Vermont.

2. Vermont is, in addition, vitally interested in assuring an additional source of electric power supply for its citizens at the lowest possible cost, consistent with applicable health and safety standards, and in time to meet the rapidly growing needs of Vermont power consumers.

The primary issue herein is whether the Atomic Energy Commission was required in its licensing proceeding to consider thermal effects on the Connecticut River which would be created by the construction of a heated water-type nuclear electricity generating unit. As will appear hereinafter, the Vermont Water Resources Board has full jurisdiction over such effects and, in fact, exercised such jurisdiction following initial unsuccessful efforts by the States of Vermont, New Hampshire and Massachusetts to invoke Atomic Energy Commission jurisdiction. Assumption at this time of jurisdiction over such effects by the Atomic Energy Commission would, as a practical matter, oust the jurisdiction of the Vermont Board, duplicating and nullifying its exhaustive proceedings already held on this very question. Moreover, it is clear that remand to the Commission for duplicative evidenciary hearings and consideration of the thermal pollution issue would delay completion of the facility beyond the date when its additional power is absolutely required by Vermont consumers and would result in additional interest and inflation expenses, thereby unnecessarily raising the ultimate cost of power to Vermont power users.

ARGUMENT

THE LOWER COURT'S DECISION HAS NO EFFECT WHATSOEVER ON STATE POWER TO REGULATE DISCHARGE OF EFFLUENT INTO STATE WATERS AND CERTIORARI SHOULD NOT BE GRANTED ON THIS GROUND

Petitioner asserts that the Court of Appeals' decision at issue herein "effectively destroys" state power to regulate discharge of effluent into its waters. Yet the decision actually has precisely the opposite effect. All that the First Circuit decision says is that Congress has not given to the Atomic Energy Commission jurisdiction to regulate such discharge. *New Hampshire v. Atomic Energy Commission,* 406 F.2d 170, 175-176 (1969). In the absence of such preemptive federal regulation of a subject matter essentially local in nature, state jurisdicition is plenary. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 10L.ed.2d 248, 256-259, reh. den. 374 U.S. 858, 10 L.ed.2d 1082 (1963). And, in fact, as noted by the First Circuit in its opinion:

> "(t)he Commission pointed out that no licensing action on its part relieved a licensee from any obligation to comply with state authorities * * * which do have jurisdiction to deal with thermal effects of power plant discharges." *New Hampshire v. Atomic Energy Commission,* 406 F.2d 173.

The existence of state power to regulate pollution-producing activities is not and never has been an issue in this proceeding. Since it is not such an issue, this Court should refuse to consider it and, *a fortiori,* should not grant certiorari. *Neely v. Eby Construction Co.,* 286 U.S. 317, 18 L.ed.2d 75, 85 (1967).

Moreover, New Hampshire in fact accepted the jurisdiction of the Vermont Water Resources Board, acting under 10 V.S.A. § 909, and participated fully in the Board's evidenciary hearing on the question, among others, of thermal pollution of the Connecticut River by the Vermont Yankee plant. The Board made extensive findings and, *inter alia,* required as a condition of its permit the construction of very costly cooling towers and maintenance of the river water temperature at certain specified increases above normal temperature. Amended findings and amended conditions to the final order of permit were made as the result of exceptions filed by the Petitioner herein. The Vermont Water Resources Board

further retained continuing jurisdiction to reopen the proceeding and modify the conditions of its permit order at the written reques of any party or if its own inspections should indicate that the unit is causing a harmful effect on the ecology of the river or on its ability to accept treated sewage.

In conclusion, it is the position of the State of Vermont that the "destruction" of state power over thermal effects on the Connecticut River is not listed by Petitioner as a "Question Presented," has never been an issue in this proceeding and was not a ground of the lower Court's decision, and that certiorari should therefore not be granted on that basis. The Commission quite properly made a determination that it did not have jurisdiction over thermal effects and did not concern itself with what other governmental authority might have such jurisdiction.

CONCLUSION

For the reasons stated above, the Petition in No. 1329 for a writ of certiorari should be denied.

Respectfully submitted,

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May 1969